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No. 79-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HALLEY I. THOMAS, *Petitioner,*

v.

WASHINGTON GAS LIGHT COMPANY

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF PETITIONER

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A. MANNINO
MARK L. SCHAFFER
JAMES F. GREEN
2101 L Street, N.W.
Suite 303
Washington, D.C. 20037

Attorneys for Petitioner

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On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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The claimant, Halley I. Thomas, petitions this Honorable Court for reversal of the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Fourth Circuit in this case (app., 1a), is unreported. The decision upon which the Fourth Circuit summarily reversed is *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), *cert. denied*, _____ U. S. _____, No. 78-1739 (1979). The final decision of the Benefits Review

Board (app., 3a), is reported at 9 BRBS 760 (1978). The initial decision of the Benefits Review Board (app., 16a), and the interlocutory (app., 34a), final (app., 20a), and supplemental (app., 9a) decisions of the Administrative Law Judge are all unpublished.

JURISDICTION

The petitioner invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

On September 24, 1974, Mr. Thomas notified the Deputy Commissioner of the Office of Workers' Compensation Programs (OWCP) of his intention to seek compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901-952 (1970) as adopted by the District of Columbia to serve as the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501-502 (1973 Ed.). Mr. Thomas' claim was initially referred to Administrative Law Judge David Pelkey. Judge Pelkey ruled that the U.S. Constitution's full faith and credit clause did not make the Virginia benefits *res judicata* (app., 34a). Subsequently, in a Final Decision and Order dated March 4, 1976, Judge Pelkey awarded Mr. Thomas benefits for permanent total disability beginning as of the date of injury (app., 20a). Washington Gas Light's (WGL) appeal to the Benefits Review Board, U.S. Department of Labor, resulted in a remand for the purpose of receiving more evidence (app., 16a). After an additional hearing, Judge Pelkey issued a Supplemental Decision and Order on January 21, 1977, reiterating his view that the full faith and credit clause did not preclude

the subsequent award and upholding the permanent total disability benefits (app., 9a). WGL again appealed to the Board, which unanimously affirmed the Administrative Law Judge (app., 3a).

WGL sought review before the United States Court of Appeals for the Fourth Circuit. On April 27, 1979, in an unpublished *per curiam* opinion, the Fourth Circuit reversed without argument on the strength of *Pettus* v. *American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978) *cert. denied.* _____U.S. _____, No. 78-1739 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.

Title 28 of the United States Code, § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Virginia Workmen's Compensation Act is embodied in Title 65.1 of the Virginia Code. VA. Code, §65.1-40 (1979 Repl. Vol.), states:

> §65.1-40. Employee's rights under Act exclude all others. —The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employees, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (Code 1950, §65-37, 1968, c.660)

Va. Code, §65.1-61 (1975 Repl. Vol.) declares:

> §65.1-61. Foreign injuries. —When an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if:
>
> (1) The contract of employment was made in this State;
> (2) The employer's place of business is in this State; and
> (3) The residence of the employee is in this State;
>
> Provided the contract of employment was not expressly for service exclusively outside of the State.
>
> But if an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Act. (Code 1950, 65-58, 1968, c.660)

QUESTION PRESENTED

Whether, by operation of the full faith and credit clause, approval by the Industrial Commission of Virginia of an agreement providing temporary disability benefits under the Virginia Workmen's Compensation Act precludes an award for permanent disability under the compensation law of the District of Columbia.

STATEMENT OF THE CASE

Halley I. Thomas, a resident of the District of Columbia since 1949, was hired in 1970 as a heavy laborer by the Washington Gas Light Company (WGL) at their employment office in Washington, D.C. WGL's home office is also located in the District of Columbia. Although Mr. Thomas occasionally worked in the neighboring jurisdictions of Virginia and Maryland, approximately 60% of his duties were performed in the District. For his endeavors, Mr. Thomas received a paycheck drawn upon a District of Columbia bank.

On January 22, 1971, Mr. Thomas was breaking concrete with an air hammer in Arlington, Virginia when he sustained a disabling injury to his back. Since that date, Mr. Thomas has been unable to return to his occupation.

Prior to his being represented by counsel, Mr. Thomas agreed to accept temporary total disability benefits under the Virginia Workmen's Compensation Act on February 5, 1971, fourteen days after his injury. The Industrial Commission of Virginia subsequently approved the agreement on March 15, 1971. Mr. Thomas received the Virginia benefits until they reached the maximum amount payable under Virginia law. Mr. Thomas is currently without any disability compensation and medical coverage.

SUMMARY OF ARGUMENT

The extrajurisdictional effect of an award of the type here involved is controlled by this Court's unanimous decision in *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622 (1947). There this Court upheld a subsequent award under circumstances virtually identical to those in the present controversy. The decision established that, in the absence of an unmistakeable statutory announcement otherwise, a compensation settlement agreement shall not be construed as a final and conclusive determination of all the parties' rights and obligations. At most, the award may be final and conclusive only as to rights under the laws of that jurisdiction. Therefore, no full faith and credit barrier arises to a subsequent award under the laws of another state.

The Virginia exclusive remedy provision, Va. Code §65.1-40 (1975 Repl. Vol.), does not constitute a bar to extrajurisdictional remedies for several reasons. Initially, the Virginia judiciary has confined the operation of the provision to the accomplishment of its singular purpose, the substitution of a right to compensation for the previous right to sue for damages at common law. Virginia has specifically declined to expand the scope of the provision to preclude rights other than the right to sue an employer. Secondly, the exclusive remedy provision is to be construed liberally in the employee's favor and with a view to the humanitarian purpose of the Act. Yet the construction of the

Fourth Circuit operates most harshly against the claimant and at cross purposes to the Act's underlying goals. Thirdly, the Virginia statute is indistinguishable from the Illinois Act considered in *McCartin*. Hence, the Virginia Statute fails to express in "unmistakeable language" an intent to preclude remedies under the laws of another state as required by the *McCartin* mandate. Finally, Virginia explicitly embraces by statute a successive award where the situation is reversed and the claimant has first sought benefits elsewhere. By the same reasoning used in *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), this circumstance compels the conclusion that the intent of the Virginia statute is to permit the District of Columbia award.

In the absence of an express statutory declaration of exclusivity, the Virginia award lacks in its inherent nature the incidents of finality necessary to effect a discharge of all the claimant's rights wheresoever they might arise. Unlike a transitory tort action, the right to workmen's compensation is not a single, indivisible cause of action for which a choice of forum must be made between two or more jurisdictions authorized to grant a remedy. A compensation award received in one jurisdiction cannot possibly purport to have litigated the entirety of the claimant's rights. The limited effect of a compensation award is implicit in the *McCartin* decision, in the Virginia statute and others like it which explicitly reserve the right to authorize successive awards.

Whatever the *res judicata* effect attaching to a fully adjudicated compensation claim, the elements of a final and irrevocable choice of law are particularly absent in the facts of the present case. The ministerial approval by the Industrial Commission of Virginia of the agreement (app., 53a) does not rise to the level of a deliberate, considered adjudication. Nor can the claimant's acceptance of temporary disability benefits voluntarily offered by his em-

ployer in any sense be said to constitute an informed and irrevocable choice of law and forum.

Finally, the Virginia agreement may only be accorded the *res judicata* effect in the District of Columbia that it has in Virginia. Since the agreement was restricted to temporary disability, the Virginia Commission retained jurisdiction to issue a supplemental award for any residual permanent disability. With the question of permanent disability undecided, the Virginia award was not completely final and the D.C. award for permanency represents no collateral attack on the Virginia agreement.

ARGUMENT

I. The Full Faith And Credit Clause Does Not Operate To Make Approval By The Industrial Commission Of Virginia Of A Workmen's Compensation Agreement A Bar To An Award For Permanent Disability Under The Compensation Law Of The District Of Columbia.

The present controversy is squarely governed by this Court's mandate in *Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622 (1947). There, both the employee and his employer were residents of Illinois, where the contract of employment was formed. However, on a building job in Wisconsin, the employee suffered an injury to his eye. By virtue of a settlement contract approved by a workmen's compensation commissioner, the employer began paying benefits under the Illinois compensation law. The agreement was "in full and final settlement of any and all claims arising out of [the employee's] injury by virtue of the Illinois Workmen's Compensation Act." 330 U.S. at 624. Under the terms of that Act, the recovery of benefits was to the exclusion of any other "common law or statutory right." Nonetheless, the Wisconsin Workmen's Compensation Commission subsequently granted a compensation award to the claimant according to the terms of the Wisconsin Act.

This Court unanimously upheld the Wisconsin award. The underlying basis of the Court's rationale is disclosed by its concluding statement: "Since this Illinois award is final and conclusive only as to rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws." 330 U.S. at 630. Although the settlement contract had included a proviso disavowing any impact on the claimant's Wisconsin rights, Justice Murphy noted that "the reservation spells out what we believe to be implicit in that Act—namely that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state." 330 U.S. at 630.

The decision in *Magnolia Petroleum Co.* v.*Hunt*, 320 U.S. 430 (1943), thought to be controlling by the Fourth Circuit, is wholly distinguishable from the present controversy. In *Magnolia*, an oil field worker was injured in Texas and filed a claim for compensation in that state. The employer's insurer began paying the employee weekly benefits without an award. Eventually, a dispute arose and a hearing was set on the claim. Upon the employee's failure to appear, a single lump sum award was entered on behalf of the claimant as "full compensation for his injury." 320 U.S. at 433. No appeal was taken and the award became final. Subsequently, the employee filed a claim with Louisiana, where he resided, and received an award under that Act.

The majority found that the Texas compensation award was "explicitly made by statute in lieu of any other recovery for injury to the employee. . . ." 320 U.S. at 435. The majority also concluded that the Texas award

"was a conclusive determination between the parties that petitioner should be liable for no more than the amount of the Texas award." 320 U.S. at 442. Thus, in a 5-4 decision, this Court held that Louisiana was obliged by the full faith and credit clause to view the Texas award as a bar to enforcement of its own statute.

The unanimous *McCartin* decision enumerated the basic distinction underlying the two cases when it ruled:

> If it were apparent that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, the decision in the *Magnolia Petroleum Co.* case would be controlling here. The Court there found that the compensation award under the Texas Workmen's Compensation Law was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state. And since the Texas award had the degree of finality contemplated by the full faith and credit clause, it was held that Louisiana was constitutionally forbidden from entering a subsequent award under its statute. But we do not believe that the same situation exists in this case, the Illinois award being different in its nature and effect from the Texas award in the *Magnolia* case. 330 U.S. at 626-27 (citations omitted).

Hence, the ultimate measure of the controversy must be the nature and effect accorded the Virginia agreement. This Court has isolated as relevant to such a dispute considerations of clarity, scope and intent of the statutory language and the degree of finality of the compensation award. As an overall principle, it is clear that unless the Virginia agreement was intended to be final and conclusive of the entirety of Mr. Thomas' rights wheresoever they might arise, there is no full faith and credit restriction imposed on the District of Columbia.

A. The Virginia Workmen's Compensation Act's Exclusive Remedy Provision Did Not Impute To The Compensation Agreement The Effect Of Foreclosing The Claimant's Right To Any Further Remedy Under The Laws Of The District Of Columbia.

It is clear from Virginia decisional law, universal principles of workmen's compensation, and long-standing directives by this Court, that the Virginia exclusive remedy provision is not effective to inhibit a claimant's remedies outside the state of Virginia. At most, the Virginia Act makes its benefits the exclusive remedy *within that jurisdiction*. The Virginia provision states:

> The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by 'accident' shall exclude all other rights and remedies of such employee . . .at common law or otherwise on account of such injury, loss of service or death.

Va. Code, §65.1-40 (1975 Repl. Vol.).

The Court of Appeal's expansive reading of this provision is directly contrary to the Virginia Supreme Court's own interpretation. Virginia has declared that the sole purpose of the provision is to substitute an administrative compensation remedy for the previously unsatisfactory common law action. The scope of the provision has thus been limited by the Supreme Court of Virginia in a manner consistent with that purpose. It has been repeatedly held that only the employee's right to sue his employer for damages is barred by the acceptance of compensation under the Act. *Veale* v. *Norfolk and W. Ry.*, 204 Va. 822, 139 S.E.2d 797 (1965), *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). The Fourth Circuit itself has permitted

a recipient of Virginia compensation benefits to seek recovery for the same injury under the Longshoremen's & Harbor Workers' Compensation Act and, in negligence, under the general maritime law or as a seaman under the Jones Act, 46 U.S.C. §688 (1970). *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). However, nine years later, the Fourth Circuit departed from *Biggs* and Virginia precedent, holding that the Virginia statute precludes further compensation recovery under the District of Columbia. *Pettus* v. *American Airlines*, 587 F.2d 627 at 631-32 (4th Cir. 1978), *cert. denied*, _____ U.S. _____, No. 78-1739 (1979).[1] Nonetheless, it would be improvident to ascribe any precedental value to *Pettus*, because it was soon rejected by the District of Columbia Circuit in *Director, OWCP* v. *National Van Lines, Inc.*, No. 78-1259 (D.C. Cir. 1979) (slip op.). In the latter case, it was argued that the employee was barred from pursuing his remedies under the District of Columbia Workmen's Compensation Act solely because he had accepted an earlier award of workmen's compensation benefits under the Virginia Act. The District of Columbia Circuit explained that unlike many controversies over choice of law, it was not neccessary to identify one jurisdiction with predominant contracts or interests to the exclusion of

[1] In addition, the Fourth Circuit's construction of *Magnolia* and *McCartin* is in express conflict with the position of most state courts. *Jordan* v. *Industrial Commission*, 117 Ariz. 215, 571 P.2d 712 (1977); *Stanley* v. *Hinchcliffe and Kenner*, 395 Mich. 645, 238 N.W.2d 13 (1976); *Ryder* v. *Insurance Company of North America*, 282 S.2d 771 (La. App. 1973); *Wood* v. *Aetna Casualty & Surety Company*, 260 Md.651, 273 A.2d 125 (1971); *Industrial Track Builders of America* v. *Lemaster*, 429 S.W.2d 403 (Ky. 1968); *Harrison Company* v. *Norton*, 244 Miss. 752, 146 S.2d 327 (1962); *Cook* v. *Minneapolis Bridge Construction Co.*, 231 Minn. 433. 43 N.W.2d 792 (1950). *See also Restatement of Conflict of Laws* § 403 (1934); *Restatement (Second) of Conflict of Laws*, §182 (1971).

another, so long as the proposed forum's interest was legitimate and substantial in itself. In repudiating the conclusion reached by the Fourth Circuit in *Pettus*, the Court adopted the reasoning of another panel of the Fourth Circuit, reached five days before in *Newport News Shipbuilding and Dry Dock Co.* v. *Director, Office of Workers' Compensation Programs*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979), and concluded that the Virginia Act precluded the employee from pursuing only his other Virginia common law and statutory remedies. The court also found that in claims where the District of Columbia had concurrent jurisdiction, the principles of *res judicata* and collateral estoppel did not preclude the District of Columbia Workmen's Compensation Board from awarding additional benefits based on its own independent decision, pursuant to the District of Columbia Act.

The District of Columbia Circuit's interpretation of the exclusive remedy provision is virtually required by the universal principle recognized in Virginia that the workmen's compensation act should be liberally construed in favor of the employee in order to effectuate its humanitarian purpose. *Barker* v. *Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968); *Byrd* v. *Stonega Coke & Coal Co.*, 182 Va. 212, 28 S.E.2d 725 (1944). The humanitarian purpose of the Virginia statute was to guarantee prompt aid for the injured employee often denied by the inexorable rule of the common law. *Fauver* v. *Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). Thus, the Virginia courts have resolved to construe the exclusive remedy provision in light of the controlling purposes of the Act. *Griffith* v. *Raven Red Ash Coal Co.*, 179 Va. 790, 20 S.E.2d 530 (1942).

Unfortunately, the lower Court's decision abandons the rule of liberal construction and operates most harshly against the injured employee. The decision below fore-

closes the claimant's rights under the District of Columbia Workers' Compensation Act. The benefits payable under that Act represent a determination of the minimum subsistence level necessary for a disabled employee residing in that jurisdiction. The District of Columbia has determined to provide full reimbursement of the injured worker's medical expenses, 33 U.S.C. § 907 (1970 & Supp. V. 1975), to provide benefits for permanent and total disability (there is no time limit imposed and the benefits will continue indefinitely, 33 U.S.C. § 908(a) (1970 & Supp. V. 1975)), and to provide an annual upward adjustment of his disability benefits, 33 U.S.C. § 910(h) (Supp. V. 1975). In contrast, the Virginia agreement limited Mr. Thomas to a series of weekly payments amounting to $24,400.00. Va. Code, § 65.1-54 (1968) (amended 1970). In addition, the employer's responsibility to compensate the claimant for his medical expenses terminated after three years. Va. Code, § 65.1-88 (1968) (amended 1970). As an end result, the claimant has been adjudged permanently and totally disabled since March 4, 1976, but is receiving no compensation benefits or reimbursement for his extensive medical costs.

Surely in light of these considerations, it is only prudent to require evidence of an explicit and unambiguous legislative intent to bar extrajurisdictional compensation remedies. Such was the precise rule announced in *McCartin*:

> [T]here is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakeable language by a state legislature or judiciary would warrant our accepting such a construction. 330 U.S. 627-28 (citations omitted).[2]

The Wisconsin statute's bar of any other "common law of statutory right" is virtually indistinguishable from the

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[2] Although *McCartin* did not expressly override *Magnolia*, it has been widely interpreted as sanctioning a successive award in the absence of an express statutory prohibition to the contrary. 4 A. Larson, *The Law of Workmen's Compensation* § 85.40 (1970). In view of the number of states whose compensation statutes lack such an express prohibition, the decision pre-empts the applicability of *Magnolia* in nearly every jurisdiction. Indeed, Professor Larson notes in his treatise that due to the lack of such an express prohibition in Texas, the *Magnolia* doctrine may not even apply to the statute it originally govered. 4 A. Larson, *The Law of Workmen's Compensation* §85.30 (1970). *See Griffin* v. *Universal Underwriters Ins. Co.* 283 S.2d 748 (La. Sup. Ct. 1973), *cert. denied*, 416 U.S. 904 (1974). The progeny of *McCartin* envince a continuing willingness by many jurisdictions to compensate a worker who has earlier sought and received benefits for the same injury in another state. *Sager* v. *Royce Kershaw Co., Inc.*, 359 S.2d 398 (Ala. Civ. App. 1978); *Jordan* v. *Industrial Comm'n*, 571 P.2d 712 (Ariz. Ct. App. 1977); *American Mut. Ins. Co.* v. *Duvall*, 372 A.2d 263 (N.H. Sup. Ct. 1977); *Roberts* v. *United States Steel Corp., Fairless Works*, 311 A.2d 125 (N.J. Super. Ct. 1971); *Industrial Track Builders of America* v. *Lemaster*, 429 S.W.2d 403 (Ky. Ct. App. 1968); *Schenkel* v. *Tower Builders Co.*, 157 N.W.2d 204 (Mich. Sup. Ct. 1968); *Houle* v. *Stearns-Rogers Mfg. Co.*, 157 N.W.2d 362 (Minn. Sup. Ct. 1968); *Secrest Pipe Coating Co.* v. *Strickland* 447 P.2d 435 (Okla. Sup. Ct. 1968); *Chapman* v. *John St. John Drilling Co.*, 387 P.2d 462 (N.M. Sup. Ct. 1963); *Nevada Indus. Comm'n* v. *Underwood*, 387 P.2d 663 (Nev. Cup. Ct. 1963); *Texas Employers' Ins. Ass'n* v. *Miller*, 370 S.W.2d 12 (Tex. Civ. App. 1963); *Harrison Co.* v. *Norton*, 146 S.2d 327 (Miss. Sup. Ct. 1962); *McGehee Hatchery Co.* v. *Gunter*, 350 S.W.2d 608 (Ark. Sup. Ct. 1961) *Della Vecchia* v. *World Scope Publishing Co.*, 165 A.2d 872 (N.J. Super. Ct. 1960); *Lavoie's Case*, 135 N.E.2d 750 (Mass. Sup. Jud. Ct. 1956); *Cook* v. *Minneapolis Bridge Constr. Co.*, 43 N.W.2d 792 (Minn. Sup. Ct. 1950); *Cline* v. *Byrne Doors, Inc.*, 37N.W.2d 630 (Mich. Sup. Ct. 1949); *Industrial Indem. Exch.* v. *Industrial Accident Comm'n*, 80 Cal.2d 480, 182 P.2d 309 (Cal. Dist. Ct. App. 1947).

exclusion in Virginia of recovery at "common law or otherwise."

Finally, the lower Court's interpretation of the Virginia Act is unreasonable in light of the authorization by the Virginia legislature of a compensation remedy notwithstanding the claimant's earlier resort to another forum's compensation statute. The Virginia Workmen's Compensation Act fully embraces the concept of prior awards from different jurisdictions. Va. Code, § 65.1-61 (1975 Repl. Vol.). The only restriction imposed is that the second award be subject to a credit for all payments made under the previous statute in order to prevent double recovery. Undoubtedly, this proviso bears directly on the likely intent of the legislature as to the operation of the exclusive remedy provision. It is extremely doubtful that the Virginia legislature, in the same legislation, would condemn successive awards by another jurisdiction while reserving the same right for itself.

In this regard, *Magnolia* supports rather than detracts from the claimant's position. The Texas Act was unique in that it had been judicially construed to provide that "a compensation award may not be had in Texas if the employee has claimed and received compensation for his injury under the laws of another state." 320 U.S. at 435. The majority inferred from the lower Court's construction that Texas must also have intended to preclude a subsequent award by another state. This element wholly distinguishes *Magnolia* from the present controversy. Mr. Chief Justice Stone expressly limited the scope of the majority decision to this situation: "We have no occasion to consider what effect would be required to be given to the Texas award if the Texas courts held that an award of compensation in another state would not bar an award in Texas, ..." 320 U.S. at 443. Faithfulness to the central rationale of the *Magnolia* decision compels a contrary

conclusion where, as here, a prior District of Columbia award is permitted by the Commonwealth of Virginia.

In conclusion, the extent to which the statute of any one state may qualify or deny rights under the statute of another presents a question under the full faith and credit clause which this Court must determine for itself. *Alaska Packers Association* v. *Industrial Accident Commission of California,* 294 U.S. 532 (1935). In making the determination, this Court should attempt to accommodate the interest of the District of Columbia so that it shall not be compelled "to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state even though that statute is of controlling force in the Courts of the state of its enactment with respect to the same persons and events." *Pacific Employers Insurance Co.* v. *Industrial Accident Commission,* 306 U.S. 492, at 502 (1939). As there is no basis for interpreting the Virginia statute as exclusive of extrajurisdictional remedies, and since several factors militate against such a construction, the Virginia exclusive remedy provision should not stand as a bar to the enforcement of the District of Columbia Act.

B. Absent An Express Statutory Declaration, The Mere Approval By The Industrial Commission Of Virginia Of An Agreement For Temporary Disability Benefits Did Not Constitute A Final And Conclusive Determination Of All The Claimant's Rights To The Exclusion Of Any Further Remedy Under The Laws Of The District Of Columbia.

A workmen's compensation claim is not a single, indivisible "cause of action" for which a choice of law and forum must be made. On the contrary, a workman injured

in the course of his employment may be provided separate and distinct statutory remedies by two or more jurisdictions. Each remedy is limited to the terms of the enabling legislation, often by the condition that any recovery from another jurisdiction must be offset against any recovery under the statute in question. The receipt of benefits under one statute is not automatically an irrevocable choice of law. To hold otherwise would undermine the unique nature of a compensation recovery implicit in the Virginia statute and others like it which specifically endorse supplemental awards. Va. Code § 65.1-61 (1975 Repl. Vol.).[3]

Even in its highest form of judicial finality, a compensation award may only resolve the claimant's rights under that compensation statute. Unlike a common law judgment, an award cannot constitute a merger of the claimant's entire cause of action, including rights under another statute. The Industrial Commission of Virginia is an administrative tribunal whose authority is confined to a resolution of claims deemed within the provisions of the Virginia Workmen's Compensation Act. Therefore, as Judge Hall argued in his dissent in *Pettus:*

> [I]f the remedy under one state's law is not exclusive, there is no choice of law made. The administrative tribunal in State A determines *only* whether the claim falls under the workmen's compensation laws of State A; it does not, and could not, determine whether the workmen's compensation laws of State B, . . .587 F.2d at 634. *See also Newport News Shipbuilding and Dry Dock Co.*, v. *Director, OWCP,* 583 F.2d 1273 (1978); *Director, OWCP* v. *National Van Lines,* No. 78-1259, (D.C. Cir. 1979) (slip. op.).

This is the fundamental difference between *Magnolia* and *McCartin*. The majority in *Magnolia* put the Texas

[3] *See* Ala. Code § 25-5-25 (e) (1975); Ga. Code § 114-411 (1935); Ky. Rev. Stat. § 342.670 (1973 Repl. Vol.); Mass. Gen. Laws Ann. ch. 152, § 26 (1958); Md. Ann. Code art. 101, §§ 1-102 (1957) (Supp. 1974); N.D. Cent. Code ch. 65, § 01-01 (1960).

compensation award in the same posture as a judgment for personal injury at common law. Since "it has never been thought that an actionable personal injury gives rise to as many causes of action as there are states whose laws will permit a suit to recover for the injury . . . ." 320 U.S. at 445, the claimant was held barred from further remedies. However, the four dissenters argued forcefully that "the Texas award purported to do no more than to adjudicate his rights and duties under the Texas Act." 320 U.S. at 448.

Later decisions have endorsed the dissenters' view. Implicit in the *McCartin* result is that "proceedings under the industrial commission statutes are not like common law causes of actions that when transitory permit suit to be brought in either of two states . . . ." *Spietz* v. *Industrial Commission,* 251 Wis. 168, 28 N.W.2d 354 at 359 (1947). In a similar situation, *Carroll* v. *Lanza,* 349 U.S. 408 (1955), this Court held that Arkansas could adopt the Missouri Compensation Act or "supplement it or displace it with another." 349 U.S. at 414. The clear implication is that state workmen's compensation remedies do not afford single, indivisible causes of action in the nature of common law suits for damages.

Indeed, workmen's compensation represents a marked departure from the traditional common law structure. Frustrated by the procedural and substantive inadequacies of the common law system, states enacted specialized statutes in substitution of the common law. These statutes guarantee an expeditious remedy to the injured workmen. Therefore, absent an express statutory declaration, recovery under the Virginia Act could not bar District of Columbia rights. Even if Mr. Thomas' claim had been the object of a final award, forever resolving his right to temporary total disability compensation in Virginia, he should still have been able to supplement his remedy in the District of Columbia.

Two further elements cause the Virginia agreement to lack the degree of finality demanded by the *McCartin* court in order to constitute a full faith and credit bar. Initially, the Virginia agreement was not conclusive in its nature. The procedure by which Mr. Thomas acquired his rights did not rise to the level of finality characteristic of judicial or quasi-judicial proceedings. Benefits were paid to Mr. Thomas pursuant to a simple, informal agreement of the same effect as the settlement in *McCartin* (app., 53a). Provision is made in the Virginia Act for the negotiation and approval of such agreements in lieu of the formal adjudicative process. These agreements are encouraged by the state as a means of insuring that a subsistence level of benefits reaches the disabled employee as soon as possible. Missing from the Virginia agreement are the formality and finality of an adjudicatory process pursued to judgment. This distinction was of decisive significance in *Carroll* v. *Lanza*, 349 U.S. 408, 409 (1955), wherein this Court considered the effect of a recovery under a Missouri compensation statute which also purported to be exclusive of "all other rights and remedies . . . at common law or otherwise." The employer had made 34 weekly payments under the Missouri Act without a formal adjudication. The employer argued that he was therefore insulated from the employee's suit for damages in Arkansas. The Court responded that:

> The Court of Appeals thought *Magnolia Petroleum Co.* v. *Hunt* to be controlling. There the employee having received a *final award* for compensation in the forum of the injury returned to his home State and sued to recover under its Compensation Act. We held that the latter suit was precluded by the Full Faith and Credit Clause . . . Under that Act the statutory payments apparently start automatically on receipt of notice of the injury. While provision is made for an adjudication of disputes between an employee and his employer, no adjudication was sought or obtained here. 349 U.S. at 410-11 (citations omitted).

The impact of the distinction is clear. It can hardly be said that approval of the agreement by the Industrial Commission, largely a ministerial act, constituted a deliberate and considered adjudication. Nor can it reasonably be said that acceptance by the employee of benefits offered eight days after the accident constituted an informed and irrevocable choice of law operating as a *res judicata* bar to further recovery for the employee's injury. The Final Order by the District of Columbia evidences no disregard for a final determination made in the course of a state's "judicial proceedings," which the full faith and credit clause was designed to reach.

Additionally, the Virginia agreement lacked finality in its effect. Mr. Thomas' consent extended only to the commencement of temporary disability payments. The Virginia commission still retained jurisdiction in order to assess a new award for any residual permanent disability. Hence, the eventual extent of the claimant's rights remained thoroughly unresolved. This factor is in stark contrast to the *Magnolia* lump sum award which was expressly stated to constitute the only compensation for the employee's injury.

The Virginia agreement did not accomplish a final determination of all the claimant's rights. Under the rule announced in *McCartin*, the District of Columbia is therefore free to enforce its own statute. *Speitz* v. *Industrial Commission*, 251 Wis. 168, 28 N.W.2d 354 (1947). Even under the more strict *Magnolia* rule, the Virginia award, given full *res judicata* status, does not bar the claimant's other rights. It is well-settled that the approved agreement may only be *res judicata* in the District of Columbia to the same extent it is *res judicata* in Virginia. *Magnolia Petro-*

leum Co. v. *Hunt,* 320 U.S. 430 (1943). Since the Virginia award is, at most, a resolution of the claimant's rights to temporary total disability benefits, the District's award for permanent total disability is consistent with the Virginia award and constitutes no collateral attack on its validity.

CONCLUSION

It is evident that the exclusive remedy clause of the Virginia Act does not foreclose the claimant from seeking supplemental workmen's compensation benefits under the law of his domicile, the District of Columbia. The recent decisions of the Fourth Circuit have been an anomaly in this area of the law. It is certain that neither the full faith and credit clause of the United States Constitution nor the decisions enunciated by this Court in *Industrial Commission of Wisconsin* v. *McCartin* and *Magnolia Petroleum Co.* v. *Hunt* warrant the degree of restrictiveness that the Fourth Circuit has seen fit to impose.

It is commonly accepted that inherent in the full faith and credit clause are societal interests that are promoted by having a predictable and recognizable end to litigation. The accepted corollary of this is that these interests are only advanced when the claimant has been allowed due process of law in the pursuit of his remedies. Consequently, the doctrine of *res judicata* has only been applied to a successive action, where the issues presented have been, or should have been, fully litigated in the prior action.

In the instant proceeding, Mr. Thomas both lived and performed the majority of his work in the District of Columbia. His employer, The Washington Gas Light Company, was a corporation doing business in the District of Columbia. Recognizing the obvious advantage in the Virginia Act, the employer seized on the fortuity of the injury occurring in Virginia and directed its employee to that forum to seek compensation. In the non-adversarial proceeding that followed, Mr. Thomas agreed to accept the payments for temporary total disability volunteered by the Washington Gas Light Company.

This is not the scenario of litigation usually contemplated for application of the doctrine of *res judicata.* The Fourth Circuit, in applying the doctrine here, has committed reversible error by extending the effect of the Virginia award beyond even its own purported scope.

Furthermore, the *Magnolia* decision, on which the Fourth Circuit relies, does not mandate or support the interpretation given the Virginia exclusive remedy provision. In reaching its solution, that Court was faced with a final, non-open-ended award from a Texas court. Under such circumstances, the exclusive remedy provision could more readily be considered a final adjudication of the claim raised without doing violence to the due process principles inherent in the full faith and credit clause.

This case is more analogous to *McCartin,* where this Court limited the Illinois exclusive remedy clause to apply only to other common law or statutory rights in Illinois. The Illinois award also was not intended to be final and conclusive of all the claimant's rights and accordingly, this Court declined to impose the doctrine of *res judicata* and allowed a supplemental claim.

The direct result of the action taken by the Fourth Circuit has been a frustration of the legislated policy of the District of Columbia. If the decision of the Fourth Circuit is left undisturbed, a totally disabled worker, whose claim has been adjudged compensable in the District of Columbia, will be left without any hope for relief.

The overwhelming conclusion must be that the Fourth Circuit has erred in its interpretation of the exclusive remedy provision of the Virginia Act. Therefore, it is respectfully requested that this Court enter an Order reversing the United States Fourth Circuit Court of Appeals

and reinstating the District of Columbia final award. In so doing, this Court will have removed the unconstitutional pall that looms over every District of Columbia employee who must cross the boundaries of these local jurisdictions in his regular course of employment.

Respectfully submitted,

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A. MANNINO
MARK L. SCHAFFER
JAMES F. GREEN
2101 L Street, N.W.
Suite 303
Washington, D.C. 20037

Attorneys for Petitioner